A

SOORYA KUMAR NARAYANAN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ABU SAMAH NORDIN JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: P-05-55-04]

C

3 JUNE 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Presumption of trafficking - Whether express affirmative finding of possession required to raise presumption of*

D *trafficking - Neither express affirmative finding of possession nor finding of actual act of trafficking made by trial judge - Whether trial judge's finding that accused failed to rebut presumption of trafficking a misdirection - Prosecution advancing case based on presumptions under s. 37 of the Act - Whether prosecution later in case permitted to base*

E *case on actual finding of trafficking - Dangerous Drugs Act 1952, ss. 37, 39B(1)(a)*

EVIDENCE: *Presumptions - Trafficking in dangerous drugs - Presumption of trafficking - Whether express affirmative finding of*

F *possession required to raise presumption of trafficking - Neither express affirmative finding of possession nor finding of actual act of trafficking made by trial judge - Whether trial judge's finding that accused failed to rebut presumption of trafficking a misdirection*

WORDS & PHRASES: *'found in possession' - Dangerous Drugs Act*

G *1952, s 37(da)*

The accused was charged in the High Court with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was convicted thereon and sentenced to

H death. He appealed to the Court of Appeal. In the Court of Appeal, counsel for the accused impugned the decision of the High Court on, *inter alia*, the following grounds: (i) at the close of the prosecution's case, the High Court Judge did not make an affirmative finding of possession before applying the presumption of

I trafficking under s. 37(da) of the Act; (ii) the trial judge misdirected himself when he found that the accused had failed to rebut the presumption of trafficking, in the absence of an express affirmative

finding of possession; and (iii) the judge misdirected himself when he referred to "presumed transportation", which was not provided for under the Act.

Held (substituting the conviction and sentence for drug trafficking and substituting therefor a conviction for possession of dangerous drugs and a sentence of 20 years' imprisonment and 15 strokes of the rotan)
Per Ahmad Maarop JCA:

(1) The phrase 'found in possession' under s. 37(da) of the Act requires an express affirmative finding of possession, based on evidence, in order to give rise to the presumption of trafficking. A trial judge is required to carry out a separate exercise under s. 37(da) when determining whether an accused person is 'found in possession' of dangerous drugs. The presumption of possession under s. 37(d) of the Act, is separate and distinct from the phrase 'found in possession' under s. 37(da) of the Act. In the instant case, the trial judge had failed to make that express affirmative finding of possession of the drugs by the accused. Such failure constituted a serious misdirection sufficient to warrant appellate interference. The Judge did not also make a specific finding that the accused did any of the acts of trafficking as defined under s. 2 of the Act. *Muhammed Hassan v. PP* (FC) (foll); *Sharif Kadir v. PP* CA (refd); *Abillah Labo Khan v. PP* (refd). (paras 8, 9, 10, 11 & 12)

(2) The trial judge's reference to a driver of a car with drugs in the car-boot being presumed to be transporting the drugs, was a clear misdirection. There was no presumption of transporting under the Act. Further, the reference by the trial judge to a presumption of knowledge on the part of the accused that the boot contained the prohibited drugs and the presumption that the accused knew what he was transporting was inappropriate as there were no such presumptions under the Act. (paras 13, 14 & 16)

(3) In the instant case, the trial judge did not make an affirmative finding of possession in order to raise the presumption of trafficking under s. 37(da) of the Act. Thus, his finding regarding the defence's failure to rebut the presumption under s. 37(da) of the Act was bewildering. (para 17)

(4) The DPP's submission that there was no question of s. 37(d) and (da) of the Act being invoked as the trial Judge had relied on the definition of trafficking under s. 2 of the Act could not be sustained for two reasons. Firstly, at the close of the prosecution's case, the trial judge had not made any specific finding that the accused had committed any of the acts that constituted trafficking, defined under s. 2 of the Act. Secondly, if the judge was indeed relying on the definition of trafficking under s. 2 of the Act to find a *prima facie* case against the accused, he could not and should not have made the finding that the accused had failed to rebut the presumption under s. 37(da) of the Act. In the instant case, the prosecution had prosecuted its case relying on the statutory presumptions under s. 37 of the Act. The prosecution could not at a later stage seek to rely on a finding of trafficking as defined under s. 2 of the Act. *Lim Hock Boon v. PP* (foll). (para 17)

(5) The trial judge was clearly confused and had seriously misdirected himself. The Court of Appeal was left in serious doubt whether at the close of the prosecution's case the trial judge had relied on the statutory presumptions under s. 37 of the Act or on proof of an actual act of trafficking as defined under s. 2 of the Act. Thus, the benefit of the doubt had to be given to the accused. Not having the opportunity of observing the witnesses in giving evidence, the Court of Appeal did not consider it appropriate and safe to make either an express affirmative finding of possession or to make a specific finding of an act of trafficking as defined under s. 2 of the Act. (paras 18 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh telah dituduh dalam Mahkamah Tinggi dengan mengedar dadah merbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Beliau telah disabit dan dikenakan hukuman mati. Beliau merayu ke Mahkamah Rayuan. Dalam Mahkamah Rayuan, peguam untuk tertuduh mempersoalkan keputusan Mahkamah Tinggi atas, antara lain, alasan-alasan yang berikut: (i) pada penghujung kes pendakwaan, hakim Mahkamah Tinggi tidak membuat satu dapatan afirmatif milikan sebelum menggunakan anggapan mengedar di bawah s. 37(da) Akta; (ii) hakim perbicaraan telah menyalaharahkan dirinya apabila beliau mendapati

bahawa tertuduh telah gagal mematahkan anggapan mengedar, dalam ketiadaan suatu dapatan afirmatif milikan yang nyata; dan (iii) hakim telah menyalaharahkan dirinya apabila beliau merujuk kepada "pengangkutan yang dianggap", yang tidak disediakan di bawah Akta.

Diputuskan (menggantikan sabitan dan hukuman bagi mengedar dadah dan menggantikan oleh itu satu sabitan bagi milikan dadah berbahaya dan satu hukuman 20 tahun dalam penjara dan 15 sebatan rotan)
Per Ahmad Maarop HMR:

(1) Phrasa 'dijumpai memiliki' di bawah s. 37(da) Akta memerlukan suatu dapatan afirmatif milikan yang nyata, berdasarkan keterangan, supaya dapat membangkitkan anggapan mengedar. Seorang hakim perbicaraan diperlukan menjalankan suatu penimbangan yang berlainan di bawah s. 37(da) apabila menentukan sama ada seorang yang tertuduh 'dijumpai memiliki' dadah berbahaya. Anggapan milikan di bawah s. 37(d) Akta, adalah berlainan dan berbeza dari phrasa 'dijumpai memiliki' di bawah s. 37(da) Akta. Dalam kes semasa, hakim perbicaraan telah gagal membuat dapatan afirmatif milikan yang nyata seperti itu oleh tertuduh. Kegagalan sebegitu merupakan satu salah arahan serius yang mencukupi untuk mewajarkan campur tangan rayuan. Hakim juga tidak membuat suatu dapatan spesifik bahawa tertuduh melakukan apa-apa perbuatan mengedar seperti yang didefinisikan di bawah s. 2 Akta. *Muhammed Hassan v. PP* (FC) (diikuti); *Sharif Kadir v. PP* CA (dirujuk); *Abillah Labo Khan v. PP* (dirujuk).

(2) Rujukan hakim perbicaraan kepada seorang pemandu satu kereta dengan dadah dalam but kereta dianggap sedang mengangkut dadah, merupakan satu salah arahan yang jelas. Tidak ada apa-apa anggapan mengangkut di bawah Akta. Lagipun, rujukan oleh hakim perbicaraan kepada suatu anggapan pengetahuan pada pihak tertuduh bahawa but itu mengandungi dadah yang dilarang itu dan anggapan bahawa tertuduh mengetahui bahawa apa yang diangkut adalah tidak berpatutan kerana tidak ada apa-apa anggapan begitu di bawah Akta.

(3) Dalam kes semasa, hakim perbicaraan tidak membuat suatu dapatan afirmatif milikan yang dapat membangkitkan anggapan mengedar di bawah s. 37(da) Akta. Oleh itu, dapatan beliau mengenai kegagalan pembelaan untuk mematahkan anggapan di bawah s. 37(da) Akta adalah membingungkan.

(4) Hujahan DPP bahawa tidak ada soalan s. 37(d) dan (da) Akta digunakan kerana hakim perbicaraan telah bergantung kepada definisi mengedar di bawah s. 2 Akta tidak boleh dibenarkan atas dua sebab. Pertamanya, pada penghujung kes pendakwaan, hakim perbicaraan tidak membuat apa-apa dapatan spesifik bahawa tertuduh telah melakukan mana-mana perbuatan yang merupakan mengedar, didefinisikan di bawah s. 2 Akta. Keduanya, jika hakim sememangnya bergantung kepada definisi mengedar di bawah s. 2 Akta untuk mendapati suatu kes prima facie terhadap tertuduh, beliau tidak boleh dan tidak seharusnya membuat dapatan bahawa tertuduh telah gagal mematahkan anggapan di bawah s. 37(da) Akta. Dalam kes semasa, pendakwaan telah mendakwa kesnya bergantung kepada anggapan statutori di bawah s. 37 Akta. Pendakwaan tidak boleh pada peringkat selanjutnya cuba bergantung kepada dapatan mengedar seperti yang didefinisikan di bawah s. 2 Akta. *Lim Hock Boon v. PP* (diikuti).

(5) Hakim perbicaraan jelas keliru dan telah menyalaharahkan dirinya denga serius. Mahkamah Rayuan mempunyai keraguan yang serius sama ada pada penghujung kes pendakwaan hakim perbicaraan telah bergantung pada anggapan statutori di bawah s. 37 Akta atau pada bukti sesuatu tindakan mengedar seperti yang didefinisikan di bawah s. 2 Akta. Oleh yang demikian, faedah kesangsian semestinya berpihak kepada tertuduh. Oleh kerana tidak berpeluang untuk melihat saksi-saksi memberi keterangan, Mahkamah Rayuan tidak menganggapnya berpatutan dan selamat untuk membuat sama ada sesuatu dapatan afirmatif milikan yang nyata atau untuk membuat suatu dapatan spesifik satu tindakan mengedar seperti yang didefinisikan di bawah s. 2 Akta.

Case(s) referred to:
Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(refd)***
Adzhaar Ahmad & Anor v. PP [1996] 4 MLJ 85 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Haryadi Dadeh v. PP [2000] 3 CLJ 553 FC ***(refd)***
Lim Hock Boon v. PP [2007] 4 CLJ 114 CA ***(foll)***

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***
Ong Ah Chuan v. PP [1980-1981] SLR 48 ***(refd)***
Shariff Kadir v. PP [2003] 1 CLJ 863 CA ***(refd)***
Wong Hing Fatt v. PP [1959] MLJ 20 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da), 39A(2), 39B(1)(a)

For the accused - Datuk Kumaraendran; M/s Kumar & Co
For the prosecution - Manoj Kurup DPP; AG's Chambers

[Appeal from High Court, Pulau Pinang; Criminal Case No: 45-10-2001]

Reported by Andrew Christopher Simon

JUDGMENT

Ahmad Maarop JCA:

[1] The accused (the appellant before us) was charged with trafficking in dangerous drugs, namely, 138,936 grammes of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") in the Penang High Court. He was found guilty, convicted and sentenced to death. He appealed to this court. Hence, the appeal before us.

[2] The brief facts of the case are these. On 11 June 1997 between 1am to 7am, L/Kpl Lee Sai Aun (PW9) was on patrol duty in a police patrol car driven by Cpl Haslan b. Abu Bakar (PW11). At about 5am on that date, they spotted two motorcars being driven in a suspicious manner. The boot of both cars appeared to them to be sagging. PW9 and PW11 followed both the cars. At a place called Taman Riong Mas, one of the cars, a white Proton Wira no. WDX 5463 (the first car) stopped on the left side of the road and the other car, a Proton Iswara no. WCX 8977 (the second car) stopped on the right. PW11 stopped the patrol car at the centre of the road between the two cars. The first car then attempted to make a getaway but PW11 moved the patrol car and blocked it. PW9 then alighted from the patrol car and asked the driver of the first car for his driving licence and identity card. There was nobody else in the first car. The driver of the first car handed to PW9 his driving licence and the receipt for renewal of identity card. PW9 ascertained that the driving licence (P22) and the identity card belonged to one Soorya Kumar

A a/l Narayanasamy. When PW9 asked the driver of the first car why the driver of the second car did not switch off the engine and alight from the car, PW9 was told that the driver of the second car did not possess a driving licence. At the same time PW9 directed the driver of the first car to get out of the car and
B to open its boot so that he could make his inspection. As soon as the driver of the first car opened the boot of the first car, the driver of the second car accelerated and sped off. The driver of the first car also ran away. PW9 and PW11 were not able to detain him. However, since there was sufficient light from the
C street lights and shops nearby, PW9 saw the face of the driver of the first car clearly. PW9 confirmed that the photograph of the person in P22 was the same person who drove the first car. PW9 identified the accused in the dock as the driver of the first car. After the accused ran away, PW9 opened the boot of the
D first car and found in it 73 packages suspected to be ganja. Upon analysis, the chemist (PW1) confirmed that the 73 packages contained a total of 138,936 grammes of cannabis, a dangerous drug under the Act.

E **[3]** To complete the narration of the facts, it must also be added that the owner of the first car was one Balan a/l Letchumanan (PW4). Sometime in May 1997, PW4 handed the car over to his brother, Subramaniam a/l Letchumanan (PW10) who was then running a car rental business registered as SJP Services. On 6 June
F 1997, at about 3pm, Vellumany a/l Perumal (PW12), a part time rental representative working for SJP Services, received a telephone call from a lady named Devi to rent a car, pursuant to which at about 6pm on that date, PW12 drove the first car to Devi's house, delivered the car to her and collected RM900 being
G deposit for rental of the car from her. Devi wanted to use the car for one week or more. According to PW12, if the person who rented the car or who paid for the rental of the car did not have a driving licence, SJP Services would require the additional driver to be named in the rental document. In the case of Devi, since
H she did not have a driving licence, each time she rented a car from SJP Services, she would give the name Soorya Kumar as the additional driver. PW12 testified that he knew Devi because each time she came to SJP Services, she would come with Soorya Kumar whom she identified as her husband. PW12 identified the
I accused in court as Soorya Kumar. On 16 June 1997 PW12 received a telephone call from a person named Soorya who informed him that the first car was at Nibong Tebal Police Station.

[4] Some three years later, on 26 August 2000, at about 3.30am the accused was arrested by Chief Inspector Radzi Ismail (PW13).

Submission By Learned Counsel For The Accused

[5] In his submission before us learned counsel for the accused relied only on one point. His complaint was that nowhere in his judgment did the learned trial judge consider the element of possession or trafficking at the close of the case for the prosecution. He submitted that at the close of the prosecution's case, the learned trial judge did not make an affirmative finding of possession. Reinforcing his point, learned counsel submitted that at the close of the prosecution's case the learned trial judge must make an affirmative finding of possession and only then could he rely on the presumption under s. 37(da) of the Act. He contended that the learned judge's failure to do so amounted to a very serious misdirection which warranted appellate interference. In support of his submission, learned counsel relied on *Abillah Labo Khan v. PP* [2002] 3 CLJ 521, *Haryadi Dadeh v. PP* [2000] 3 CLJ 553 and *Adzhaar b. Ahmad and Anor v. PP* [1996] 4 MLJ 85.

[6] Continuing his submission, learned counsel also contended that the learned trial judge erred when he considered the element of possession only at the defence stage. Learned counsel argued that the learned trial judge misdirected himself further when he referred to "presumed transportation" which learned counsel pointed out was not provided for under the Act.

Submission By The Learned DPP

[7] In his submission in reply, the learned DPP urged us to consider the accused's flight from two uniformed policemen (PW9-PW11) and the fact that large amount of cannabis was found in the boot of the first car. He contended that the accused was transporting 138,936 grammes of cannabis. He submitted that on the facts, this case fell squarely within the decision of the Privy Council case of *Ong Ah Chuan v. PP* [1980-1981] SLR 48. Thus, he argued there was no question of ss. 37(d) and (da) of the Act being invoked.

A **Decision**

[8] In *Muhammed Hassan v. PP* [1998] 2 CLJ 170, the Federal Court held that where a presumption of trafficking under s. 37(d) of the Act had been invoked, then the presumption of possession
B under s. 37(da) of the Act could no longer be invoked to support a conviction under s. 39B of the Act. Explaining the reason for the said principle, Chong Siew Fai CJ (Sabah dan Sarawak) said:

> ... the basic or primary facts needed to raise 'deemed' possession and "deemed" knowledge under s. 37(d) of the Act and those
C required to raise 'presumed ... trafficking' under s. 37(da) are different. To come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to
D arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public
E prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

The Federal Court also held that, to constitute 'possession' under
F s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

G **[9]** What the rule in *Muhammed b. Hassan v. PP (supra)* requires is that a trial judge should carry out a separate exercise under s. 37(da) when determining whether an accused is found in possession of the proscribed drugs. In other words, the presumption of possession under s. 37(d) is separate and distinct
H from the phrase 'found in possession' appearing in the presumption under s. 37(da) of the Act. (See *Shariff Kadir v. PP* [2003] 1 CLJ 863 CA, at 207, per Gopal Sri Ram JCA).

[10] We turn to the judgment of the learned trial judge. In his
I judgment, the learned trial judge's finding at the close of the prosecution's case appears under the heading, "Submission of no case". From the judgment, it seems to us that at the close of the

case for the prosecution the issue of identity of the accused was foremost in the learned judge's mind and that he accepted the evidence of identification given by PW9 and PW11 that the accused in the dock was the person who handed to PW9 the driving licence (P22) and the receipt for renewal of identity card, and then ran away. In doing so, the learned trial judge rejected the learned counsels submission that P22 was a forgery. He also did not accept learned counsel's contention that the receipt acknowledging a request for renewal of identity card could not be accepted since the person who signed the official receipt was not called to give evidence.

[11] Then the learned judge said that he was satisfied that the prosecution had proved a *prima facie* case:

> I was satisfied upon giving a maximum evaluation to the evidence before me that **the prosecution had indeed established a *prima facie* case against the accused** that warranted him entering into his defence. **The two officers who stopped his car clearly identified him.** He handed SP10 his driving licence and the receipt for the renewal of his identity card. He was asked to open the booth of the car that he was driving. He alighted from the car after having opened the booth from the inside. At that moment the other car sped off and the accused ran. The address stated in the receipt for renewal of the identity card is the same address given by his wife who hired the car WDX 5463. Evidence was led through SP12 that since the hirer could not drive, the accused's name was endorsed as the additional driver. Even in the car rental form the accused's name was endorsed. **Both witnesses SP10 & SP11 clearly identified the accused as the person who ran.** Why did he run. Should he not at least explain that. I therefore called upon him to enter into his defence. The matter was adjourned to the next day for the accused to enter into his defence. The three alternatives were explained. The accused elected to give a statement from the dock. (emphasis added)

[12] Thus, the learned judge's conclusion that the prosecution had established a *prima facie* case was based on the following findings. First, his finding that the accused was the driver of the first car when it was stopped by PW9 and PW11, and that the accused had, on request by PW9, produced the driving licence (P22) and the receipt of renewal of identity card, alighted from the first car and opened its boot. Secondly, his finding that the accused ran away as soon as the second car sped off from the

scene. Having regard to the circumstances of this case, these are all appropriate findings which the learned trial judge was entitled to make at the end of the prosecution's case. However, a very crucial finding which must be made by the learned trial judge at the close of the prosecution's case in a trafficking trial of the kind under appeal is nowhere to be found in his judgment. We find that in his judgment the learned trial judge did not make the vital express affirmative finding of possession of the proscribed drug by the accused to trigger the presumption under s. 37(da) of the Act. In our view this failure on the part of the learned judge is a serious misdirection sufficient to warrant our interference. (See *Muhammed b. Hassan v. PP (supra)*, *Abillah Labo Khan v. PP* [2002] 2 CLJ 521, CA). Further, we find that the learned judge also did not make a specific finding that the accused did any of the acts of trafficking as defined under s. 2 of the Act.

[13] That however is not the end of the matter. As we will demonstrate shortly there are other parts in his judgment in respect of which we find that the learned trial judge had erred. After setting out the substance of the accused's defence which was given as a statement from the dock, under the heading "Finding of the Court", the learned trial judge began by overruling the learned DPP's objection that since the accused had not given evidence but had only made a statement from the dock, he had no right to make any submission. That objection was based on the decision in *Wong Hing Fatt v. PP* [1959] MLJ 20. In allowing the learned counsel for the accused to submit, the learned trial judge said he could not in all conscience follow the decision in *Wong Hing Fatt*. The learned trial judge then dealt with the only issue of substance raised by the learned counsel for the accused in his final submission, namely that there was no evidence that the accused hired the car. The learned trial judge dismissed that submission as a simplistic approach to a serious issue. This is what his Lordship said:

> Even if the car was a stolen car and so long as the driver was unable to or did not explain that when he drove the stolen car he was unaware that the booth contained drugs, as defined under the Dangerous Drugs Act 1952, **the driver would be presumed to be transporting the said drugs.** (emphasis added).

[14] That in our view is clearly a misdirection because there is no presumption of transporting under the Act.

[15] Next, the learned judge set out the defence of the accused which he found to be a mere denial and then proceeded to discuss the element of knowledge. His Lordship said: A

> In this case the defence was a mere denial. On the other hand two witnesses clearly identified him as the transporter. As for knowledge of the contents, the accused ran away and was caught 3 years later for another offence and from the particulars in his identify card he was traced to this offence. He had not explained why he had run away. I have no reason to doubt the evidence of SP10 & SP11. In fact he ran away before the booth of the car was fully opened by SP10. He knew what was in the booth and is therefore presumed to have knowledge that the booth contained the prohibited drugs. Further, the large quantity of the drugs carried in the car causing the said car to sag, which in fact tipped off the patrol car officers to stop the car for inspection, would also give rise to the *presumption that the accused knew what he was transporting. I find that the defence had failed to rebut the presumption of trafficking under Section 37(da)(vi) of the Dangerous Drugs Act 1952.* Further, D31 which exhibit the accused tendered to Court, showed clearly that one of the items recovered was an ATM Public Bank Card belonging to Devi although in his statement from the dock he had said that he had separated from Devi since February 1997. I therefore found the accused guilty of the charge and convicted him. (emphasis added).

B C D E

[16] The reference by the learned trial judge to presumption of knowledge on the part of the accused that the boot contained the prohibited drugs and the presumption that the accused knew what he was transporting is inappropriate as there are no such presumptions under the Act. F

[17] We come to a more serious misdirection. This occurred when the learned judge found that the defence had failed to rebut the presumption of trafficking under s. 37(da)(vi) of the Act. On the basis of the law as stated in *Muhammed b. Hassan v. PP (supra)*, this finding presupposes that the learned judge was satisfied that the said presumption had arisen in the first place. The question is when was he so satisfied?. We have said earlier that before the presumption under s. 37(da) of the Act can arise, there must be an affirmative finding of possession. As we have demonstrated, the learned judge did not make any affirmative finding of possession at the close of the prosecution's case. So, his finding regarding the defence's failure to rebut the presumption under s. 37(da) of the Act is really bewildering. Perhaps in considering the question of G H I

trafficking the learned judge relied on the definition of trafficking under s. 2 of the Act. The learned judge's use of the term "transporting", and his remarks about the accused being identified as "the transporter" and that the accused knew what he was transporting seem to support the possibility that he had adopted such an approach. The submission of the learned deputy also seemed to suggest that was the approach taken by the learned trial judge. Indeed in this case the learned deputy contended that there was no question of ss. 37(d) and (da) of the Act being invoked. With respect we find it difficult to accept the learned deputy's submission. In the first place, at the close of the prosecution's case, the learned trial judge did not make any specific finding that the accused had committed any of the acts which constitute trafficking as defined under s. 2 of the Act. Secondly, if the learned judge was indeed relying on the definition of trafficking under s. 2 of the Act to find a *prima facie* case against the accused, he could not and should not make the finding that the accused had failed to rebut the presumption under s. 37(da) of the Act. From the appeal record in this case, we find that in the court below, the prosecution had elected and prosecuted its case relying on the statutory presumptions under s. 37 of the Act. In such a case the prosecution cannot at a later stage seek to rely on the definition under s. 2 of the Act. In this regard in *Lim Hock Boon v. PP* [2007] 4 CLJ 114, at p. 124, this court said:

> The principle to be extracted from Chia Leong Foo is that once the prosecution elects to rely on one of the statutory presumptions in s. 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s. 2 of the Act. That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s. 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s. 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s. 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.

[18] At the conclusion of his submission before us, commenting on the judgment in the court below, the learned counsel for the accused said that the learned trial judge was confused. We agree. The learned judge seriously misdirected himself and leaves us in

serious doubt as to whether at the close of the prosecution's case he was relying on the statutory presumptions under s. 37 of the Act or on the proof of actual act of trafficking as defined under s. 2 of the Act. In our view, the benefit of the doubt must be given to the accused.

[19] In his valiant effort in defending the conviction under s. 39B, the learned deputy urged us to consider the totality of the evidence in this case particularly the large quantity of the proscribed drugs found in the boot of the first car and implored us to uphold the said conviction. In *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, the Federal Court said at p. 720:

> There may well be cases where because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even **in such a case, we consider that trial court should specifically so find.** (emphasis added).

[20] Earlier, in *Muhammed Hassan v. PP (supra)* in response to somewhat similar submission as in the instant appeal, the Federal Court said:

> As regards the alternative submission of the learned Deputy Public Prosecutor that, independently of s. 37(d), there was sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence the learned trial judge did not make a finding of possession (ie, possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at any conclusion in this regard.

In that case the Federal Court quashed the conviction under s. 39B(1)(a) of the Act and set aside the death sentence. In substitution therefor, the Federal Court convicted the appellant under s. 6 of the Act and sentenced him to 16 years imprisonment with effect from the date of his arrest and ten strokes of whipping.

[21] So too here. The trial judge did not, on the evidence led before him at the close of the prosecution's case, make an express affirmative finding of possession of the proscribed drug by the accused. Further, he also did not make a specific finding of an act of trafficking of the proscribed drug being committed by the

A accused as defined in s. 2 of the Act. Not having the opportunity of observing the witnesses in giving evidence, we did not consider it appropriate and safe to arrive at any such finding.

[22] In the result we allowed the appeal, quashed the conviction
B under s. 39B of the Act and set aside the death sentence. In substitution therefor, we convicted the accused of the offence of possession of dangerous drugs under s. 6 of the Act, read with s. 39A(2) of the Act and sentenced him to 20 years imprisonment to be effective from the date of his arrest and 15 strokes of
C whipping.

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